

**IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT
OF ALABAMA, SOUTHERN DIVISION**

KELLEY FOODS OF ALABAMA, INC.,)	
)	
Plaintiff,)	
)	CIVIL ACTION NO.
v.)	1:04 - cv-01246-MHT-DRB
)	
MYERS NISSI & COMPANY, INC.; a)	
corporation d/b/a VERTICALSOFT,)	
)	
Defendant.)	

**MOTION IN LIMINE ON BEHALF OF MYERS NISSI & COMPANY, INC.
TO STRIKE THE DECLARATIONS OF GERALD CROSS AND SCOTT KELLEY**

COMES NOW Defendant, MYERS NISSI & COMPANY, INC. ("MYERS NISSI"), and moves the Court for an Order striking the declarations of Gerald Cross and Scott Kelley in this matter. In support of this motion, Myers Nissi states:

- 1) The declarations of Gerald Cross and Scott Kelley (Docket Nos. purport to give opinion testimony to the effect that "[t]he software provided by Myers Nissi never worked as had been represented and warranted, and could not satisfactorily perform the functions for which it was purchased by Kelley Foods."
- 2) Neither Gerald Cross nor Scott Kelley have any personal knowledge of the functions, workings, or programming codes specific to either the Navision "foundation software" or the "Process 800" software at issue in this matter. See Exhibit 1. As such, their declarations are inadmissible pursuant to Fed. R. Evid. 602 and 701.
- 2) Testimony regarding the functions, workings, programming codes, and/or any alleged flaws or deficiencies specific to either the Navision "foundation software" or the "Process 800" software at issue in this matter requires specialized technical knowledge that is outside the

common knowledge of a lay person and is, therefore, quintessentially “expert testimony” which this Court has previously ruled inadmissible.

3) Myers Nissi incorporates fully by reference its brief in support of this motion, filed contemporaneously herewith.

WHEREFORE, defendant, MYERS NISSI & COMPANY, INC., moves this Honorable Court for an Order striking the declarations of Gerald Cross and Scott Kelley in this matter.

Respectfully submitted,
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s/John M. Herke
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Attorneys for Defendant,
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record in this case.

s/John M. Herke
JOHN M. HERKE